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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 2335

OXFORD PAPER COMPANY,
LIBELLANT — APPELLEE

vs.

STEAMSHIP NIDARHOLM
A. S. NIDAROS,
LIBELLEE — APPELLANT

PETITION OF THE OXFORD PAPER COMPANY LIBELLANT - APPELLEE, FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN W. LOWRANCE,
Proctor for the Oxford Paper Company.

MARKS PRINTING HOUSE PORTLAND ME



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PETITION OF THE OXFORD PAPER COMPANY LIBELLANT - APPELLEE, FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, The Justices of the Supreme Court of the United States:

The petition of the Oxford Paper Company, a corporation duly organized and existing under the laws of the State of Maine, for a writ of certiorari to be directed to the Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the cause therein pending entitled—

No. 2335

STEAMSHIP NIDARHOLM
A. S. NIDAROS,
CLAIMANT - APPELLANT

v.

OXFORD PAPER COMPANY,
LIBELLANT - APPELLEE.

To the Honorable, The Justices of the Supreme Court of the United States:

The petitioner, the Oxford Paper Company, respectfully shows as follows:

FIRST: That your petitioner, a Maine Corporation, is engaged in the business of manufacturing paper in the State of Maine and is the owner of large pulp wood tracts in the Province of Nova Scotia, from which it has for a long period of time, been transporting pulp wood by steam vessels to Portland, Maine, from which latter point the pulp wood is forwarded by rail to the Company's mill.

In May, 1927, the Oxford Paper Company entered into a written charter party with the owners of the Norwegian Steamship Nidarholm to carry pulp wood from Nova Scotia to Portland, Maine, by the terms of which charter it was agreed that the Oxford Paper Company should have the entire use of said steamship Nidarholm for a period of three months on consideration of the payment of $1.55 per dw. ton per month.

The charter party provided, among other things:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with Ship's crew and boats. *The Captain* (although appointed by the Owners), *shall be under the orders and direction of the charterers as regards employment or agency; and Charters are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

In accordance with the terms of the charter party, the Steamship Nidarholm was turned over to the charterer at New Jersey and was ordered by the charterer to go to Hampton Roads, Virginia, for the purpose of carrying a load of coal from that port to Port Alfred, P. Q. After receiving a full and complete cargo of coal at Hampton Roads, the Nidarholm proceeded for Port Alfred, P. Q., but, on the way, the vessel ran ashore and remained stranded for about

four days, during which time it was necessary to lighter a large part of the vessel's cargo and run anchors and use the ship's cables in an endeavor to free the vessel.

The vessel was obliged to go on a railway for repairs but she finally arrived at the plant of the Oxford Paper Company in Murray, Nova Scotia.

PREPARATIONS FOR LOADING

Steps were immediately taken to prepare the vessel to receive the pulp wood cargo and this was done by first placing stanchions, which are wooden poles approximately twenty feet long and eight to ten inches through the butt, around the deck near the rail of the Vessel at a distance of approximately four to five feet apart, for the purpose of holding the deck cargo in place. These stanchions were furnished by the Oxford Paper Company and were held in place by wire rope lashings running from the ring bolts in the hatch coamings to approximately the center of the stanchions (see Exhibits 5, 6 page 187, 188). *These lashings were furnished by the ship, and put in place by the ship's crew.* An athwartship lashing running from the stanchion on one side opposite the foremast to and around the foremast to the stanchion on the opposite side, was suggested by the Oxford Paper Company to the master of the steamship. The master declined to follow the suggestion and such lashing was not used until *after* the loss, as hereinafter set forth.

After the stanchions were in place and fastened, the loading then commenced.

LOADING

The loading was done by means of a chute run out over the vessel's deck, and the pulp wood then came up on an endless chain, ran down the chute, from which it dropped into the vessel. The hold of the vessel was first filled and then the deck load which was held in place by the stanchions, was placed on board. The entire loading was done

under the direction and supervision of the master of the Nidarholm (The District Court so found).

The Captain, *who was the servant of the owners*, determined when the ship had sufficient cargo and also determined its trim, and when the ship was loaded to the Captain's satisfaction she sailed for Portland on her first trip under this charter, where she arrived without mishap; and on her return trip to Murray the stanchions were left standing, and on her arrival back loading was immediately commenced for the second trip.

On the second loading, everything proceeded as on the first until the ship was nearly loaded, when she started to list toward the wharf and act cranky. The stevedore immediately called the Captain and from that time until the loading was completed, the Captain ordered the cargo trimmed, just as he wanted it, and also determined the amount of the cargo and *insisted, against the advice of the stevedore, on taking more cargo than he had on the previous trip.* (See Opinion of District Court, Page 199.)

When the loading was completed the ship's docking lines were let go and the ship started on the second voyage.

ACTION OF SHIP UPON LEAVING DOCK AND STARTING TOWARD SEA

When the ship left the dock, she had a starboard list of approximately five degrees and as she backed away with her rudder amidships, she would straighten up to an even keel and then gradually drop back to the starboard list. This performance continued until the backing maneuver had been completed; and when the Nidarholm started ahead, she came up on an even keel and slowly listed over to port.

There is no contention but what the entire loss as hereinafter mentioned, took place in perfectly smooth waters, within the inner harbor of Murray.

As the Nidarholm proceeded down the harbor, the port list which she took when she started ahead, gradually increased until the vessel was listing from ten to fourteen degrees to port, and each movement of the vessel's helm

would cause the list to increase or decrease according to the vessel's course; and shortly following one sharp helm movement, the Nidarholm listed so badly that a part of her deck cargo went over the port side. When the weight of this cargo was taken from the port side, the vessel listed sharply to starboard and cleaned off the deck cargo on that side and then continued to roll back and forth until the entire deck cargo had been rolled off.

The wood was carried out to sea by an ebb tide that was then flowing, and was practically a total loss.

BEFORE THE UNITED STATES DISTRICT COURT

The hearing and argument of the case before the District Court occurred about the 4th day of May 1928, and all of the libellant's witnesses on both sides testified before the Court, with the exception of the master and mate of the Steamship Nidarholm.

The claimant did not call any other members of the ship's crew, and never attempted to explain such failure.

The Judge of the District Court ruled and held the Nidarholm solely in fault, for the following reasons:

I: That the duty was on the ship and her owners to have the ship seaworthy when she left Port.

II: That seaworthiness includes the proper stowing and staying of the deck cargo.

III: That the ship at the time of the loss was unseaworthy.

IV: That the shipowner is not relieved because the loading is done by the charterer's stevedore especially in this case as the loading was done under the supervision and instructions of the master, as the agent of the owners.

V: Because the loss may have been caused by the Captain's refusal to put the athwartship lashings as recommended by the libellant.

and thereupon a final decree for the libellant was entered in the District Court for the sum of $5,737.52 plus interest and costs.

BEFORE THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals agreed with the District Court that the Nidarholm at the time of the loss and at the time she left the Port was overloaded and clearly unseaworthy. The Court of Appeals also found the libellant in fault for not furnishing proper cribbing to hold the deck cargo in place, and the Court of Appeals ordered the decree of the District Court reversed and damages divided. *Thus reaching a conclusion just contra to the ruling of the Circuit Court of Appeals for the Second Circuit on facts almost identical.*

ON RE-HEARING

The libellant-libellee filed a petition for re-hearing and on December 11, 1929, the Circuit Court of Appeals passed down a second opinion reiterating its former opinion that the vessel was unseaworthy at the time she left the dock and at the time the loss of the deck cargo occurred, but also found that the vessel was under no obligation to furnish cribbing, and the libellant was not excused by the fact that the Captain had acquiesced in its use.

In this second opinion, as in the first, the Court of Appeals entirely overlooked the fact that the cribbing broke because the load placed against it by the master of the ship in making his own ship unseaworthy, was an excessive load, and more than the stevedore thought should be taken by the ship and because the stanchions were not supported by the athwartship lashing suggested by the libellant.

In other words, the Circuit Court of Appeals held the charterer in fault for failure to furnish stanchions to hold a load that made the ship itself unseaworthy.

And your petitioner presents herewith a certified copy of the entire record of said cause in the Circuit Court of Appeals.

And thereupon your petitioner prays that a writ of certiorari be issued from this Court to the United States Circuit Court of Appeals for the First Circuit requiring said Circuit Court of Appeals to certify and send to this

Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals to the end that the said cause may be reviewed by this Honorable Court as provided or by law for the following reasons:

I: Because the Court of Appeals in this case has made a ruling of law directly contrary to the ruling of the Circuit Court of Appeals for the Second Circuit in the case of Olsen vs. United States Shipping Co., 213 Fed. 18.

II: Because the ruling made by the Circuit Court of Appeals is directly contrary to the law in such cases as made by this Court to the effect that it is the ship's duty to properly stay and secure her cargo regardless of who loads it.

III: Because the Court of Appeals has refused to follow the rule laid down by this Court in the case of Lawrence vs Minturn, 17 Howard 392.

IV: Because the Court of Appeals having found the ship unseaworthy, did not as a matter of law hold the ship wholly in fault for the loss.

I, John W. Lowrance, having been duly admitted to practice in the Supreme Court of the United States, as an attorney and counsellor of the Court, do hereby certify that the foregoing Petition for a Writ of Certiorari has been examined by me, and that, in my opinion, for the reasons therein set forth, the Writ ought to issue as prayed for.

JOHN W. LOWRANCE,
Proctor for the Oxford Paper Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 2335

In the Matter of

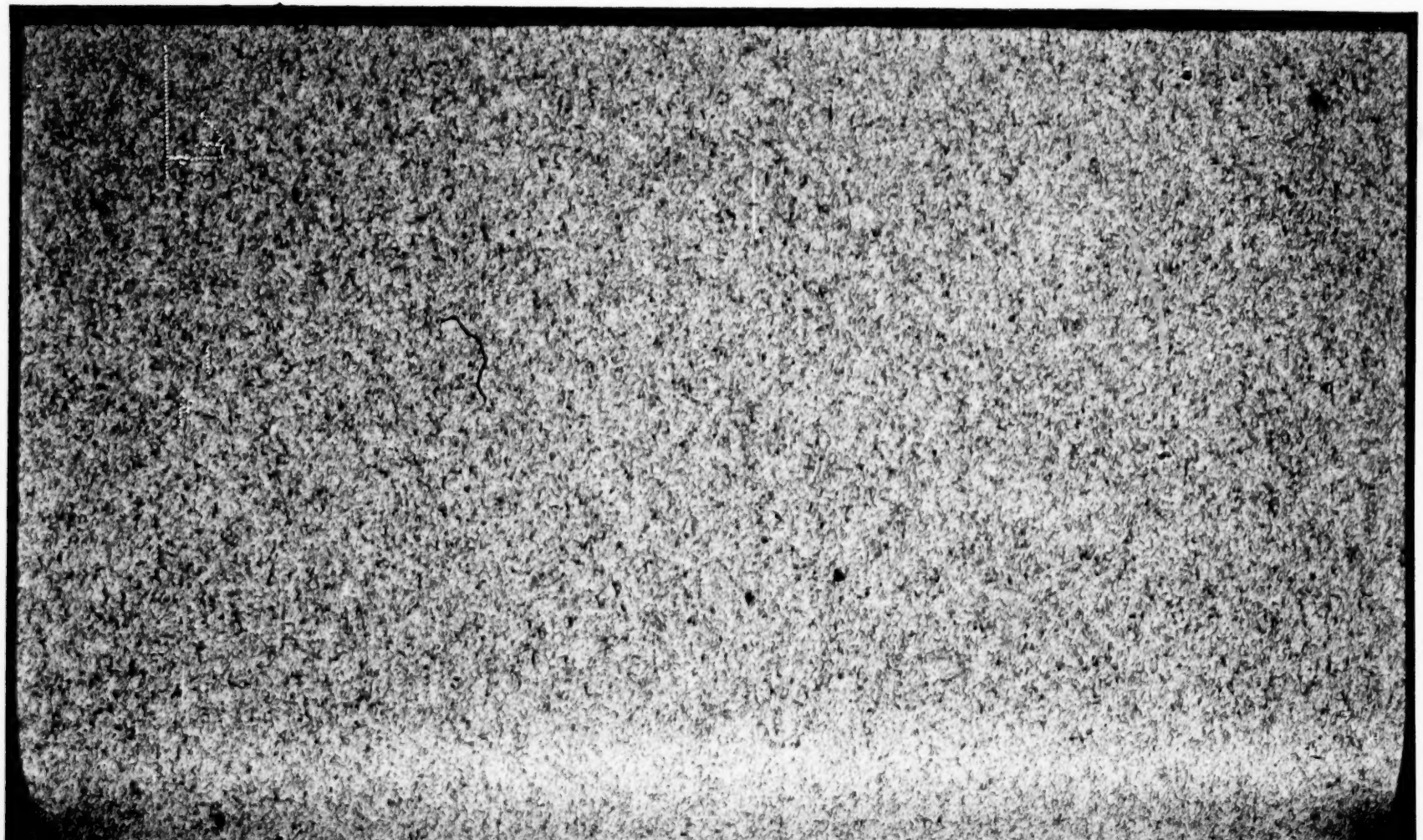
PETITION OF OXFORD PAPER COMPANY

For a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit

BRIEF IN SUPPORT OF PETITION

JOHN W. LOWRANCE
NATHAN W. THOMPSON,
For the Petitioner.

MARKS PRINTING HOUSE PORTLAND, ME



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

In Admiralty

No. 2335

OXFORD PAPER COMPANY
Petitioner
v.
STEAMSHIP NIDARHOLM
A. S. Nidaros

Steamship Nidarholm
A. S. NIDAROS
v.
OXFORD PAPER COMPANY

BRIEF FOR OXFORD PAPER COMPANY
Petitioner for Certiorari,
IN SUPPORT OF PETITION

I.

THE CAPTAIN WAS THE SERVANT OF THE SHIP-OWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED.

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

II.

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

(a) The loss was the direct result of this unseaworthiness

III.

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS AND BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP AND IMPROPERLY STOWED THE CARGO.

IV.

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS

ARGUMENT.

I.

THE CAPTAIN WAS THE SERVANT OF THE SHIPOWNER SO FAR AS THE LOADING OF THE SHIP WAS CONCERNED

The charter party, section 8, reads as follows:

"8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all the customary assistance with Ship's crew and boats. The

> Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment or agency; and *Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain*, who is to sign Bills of Lading for cargo as presented, in conformity with Mates' or Tally Clerks' receipts."

Thus by the very terms of the contract the master of the ship was the shipowner's servant for the purpose of supervising the loading and stowing of the cargo.

Unless there is an agreement to the contrary, the master is always considered agent of the shipowner, so far as the duty of loading and stowing the cargo is concerned.

In the case of *Harloff, et al. v. Barber & Co.*, 150 Fed. 185, on pp. 192, 193, *Adams*, District Judge, said:

> "'The duty of stowing the cargo in the ship lies on the owner, and on the master as his representative, unless there is an agreement to the contrary. The master ought to be a competent stevedore, and he must see that the stowage is done with skill and care. * * ' Moreover, the ship must provide whatever dunnage may be required * * * such as mats, battens, loose wood, etc. These are needful to keep the goods in their places. * * *"
>
> A chartered vessel in the absence of a special agreement, is required to supply herself with proper fittings for the carriage of lawful cargo."

On this point, the *District Court*, in its opinion in the case at bar, on page 198 said:

> "The Captain is presumed to be responsible for the ship without any express provision in the charter; and here there is an express provision in the charter giving him the supervision of the loading."

(a) The Captain did supervise and give positive instructions as to the actual loading and stowing of the cargo.

Of this fact there can be no doubt. It was found as a fact by the District Court, and never seriously questioned

by the Court of Appeals. In the opinion of the District Court, page 201 the court said:

> "In the case before me, the charter affirmatively makes it the duty of the master to suprevise the loading and stowing, and *the proofs show that he did actually attend to such supervision.*"

On page 198 the District Court further said:

> "The proofs are clearly persuasive that the captain exercised his duty of supervision"

And on page 200:

> "Upon the proofs I think the master cannot escape liability from the fact that the loading was done by the charterers. *It was done under the supervision of the captain;* and the cases make no different rule where the charterers are also the owners, as in the instant case."

The Circuit Court of Appeals found the Captain responsible for overloading the ship. First Opinion of the Circuit Court of Appeals, page 213:

> "The facts are stated in the opinion of the District Judge and need not be repeated. (26 Fed. (2d) 92. His conclusions that the steamer because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage—*faults for which her master was responsible*—were clearly correct."

Therefore both the District Court and the Circuit Court of Appeals found the ship was overloaded, and the Captain as the shipowner's agent, responsible for this condition.

II.

THE STEAMSHIP NIDARHOLM WAS POSITIVELY UNSEAWORTHY AND WHOLLY UNFIT TO PROCEED TO SEA AT THE COMMENCEMENT OF THE VOYAGE.

This fact is no longer open to dispute. The District Court found it as a fact, saying on page 199:

"Without going into more details of loading, it appears from the captain's testimony that the ship in calm weather and smooth water, while still within the harbor limits, was listed to her maximum angle of safety, and according to Carmichael, a disinterested witness, she was exceeding her angle of safety by 3 or 4 degrees. At every movement of the helm after the vessel left the dock up to the time of the loss, her list changed materially, and, immediately following a sharp movement of the helm, the cargo went off the port forward deck, abreast the foremast, at the place where the athwartship lashing proposed by the libelant should have been. It seems clear to me, even if the breaking of the stanchions and the lashing was the immediate cause of the cargo going over the rail, *that the list of the vessel was caused by her overloaded condition, over which the captain must be held by law and in fact to have been responsible.* The captain seems to have been unduly encouraged by the fact that he got safely to Portland on another trip when the ship had listed even more than on this trip; but he admits that the cargo on this trip was somewhat heavier than on the previous trip." * * *

"From the action of the ship in smooth water, I cannot escape the conclusion that she was unfit to face the perils of the sea along the exposed area of the Atlantic coast from Murray to Portland."

On page 203 the District Court said:

"I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

The Circuit Court of Appeals did not differ with the District Court on this point, and on this question of seaworthiness the Circuit Court of Appeals said, on page 213:

"The facts are stated in the opinion of the District Judge and need no be repeated. (26 Fed. (2nd) 92). His conclusions that the steamer because of excessive loading and too much deck cargo was top-heavy and unseaworthy when she began the voyage,—faults for

which her master was responsible,—were clearly correct."

Therefore both courts agreed that the ship was unseaworthy at the commencement of the voyage, and both courts found the master responsible for this condition.

The law is clear that a ship must be seaworthy at the commencement of the voyage, and this means seaworthy not only in respect to hull but also with respect to the *preparation* for and the *stowage* and staying of the cargo.

In the case of *Lawrence v. Minturn*, 17 How. 392, the *Supreme Court* on page 403 said:

> "The master is bound to use diligence and skill in stowing and staying the cargo (speaking of deck cargo)."

That the cargo was not properly stayed is definitely proven by the fact it went overboard while the ship was in calm water in the inner harbor. Thus we say in this respect the captain had not fulfilled his obligation to the charterer. *Lawrence v. Minturn* further holds that the ship owner is not responsible for the loss of a deck cargo brought about by a sea peril, and while the point is not raised in that case no other inference can be drawn from the opinion than that for loss caused by other than sea peril, the ship is clearly responsible. In the *Minturn* case the *Supreme* Court says on page 402:

> "The extent to which we understand them to go, and the law which we intend to lay down is this: that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, *by a storm*, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden."

On the same page the Court further said:

> "Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly stanch and strong. The amount of dead weight on board was not excessive, for there is no pretense that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, not until heavy seas were encountered."

Can there be any doubt but the Supreme Court would, under its ruling in the Minturn case, hold this ship wholly responsible for the loss of the deck cargo in smooth water in the harbor?

We say that the case of *Lawrence v. Minturn* is direct authority for holding the ship owner responsible for any deck cargo lost through failure of the master to properly stay and secure the cargo from other than perils of the sea.

Again, referring to the authority of *Lawrence v. Minturn*, *Judge Ward*, speaking for the Circuit Court of Appeals for the Second Circuit, in the case of *Olsen v. United States Shipping Co.*, 213 Fed. 18, on pp. 20 and 21 said:

> "Likewise, when cargo loaded on deck by agreement is lost because of *a peril of the sea* the ship will be excused. Lawrence v. Minturn, 17 How. 100, 15 L. Ed. 58. We are not willing to extend this to such a loading as makes the ship herself unseaworthy when no sea peril is encountered. It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. *It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading;* insisted upon his taking the deckload or that surveyors

certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

An page 20 *Judge Ward* further said:

"The master accordingly moved the steamer astern to pick up her after anchor, without waiting to lash the forward deckload and in backing she struck the side of the bank. Some of the wooden uprights on the port side, fixed to keep the deckload in place, broke and twenty logs were thrown off. A survey was held which recommended that 279 more logs be discharged and the whole 299 logs rafted to Ship Island, to be reloaded there. The district Judge held that the expenses connected with the falling of the deckload at Gulfport should be divided between the owner and charterer, the former being at fault for not lashing the deckload and the latter for loading it. We think that it is chargeable to the owners only because the master should not have started to Ship Island until he had secured the forward deckload. The accident was not due to the striking of the bank, but to the fact that the vessel was unseaworthy as to her forward deckload, a thing which it was the duty of the master to prevent."

In the case of *the Seguranca*, 250 Fed. 19, the Circuit Court of Appeals for the Fifth Circuit (construing a charter party, using practically the identical language as the charter in this case where it related to the captain's supervision of the loading), stated that it was immaterial what caused the tenderness of the ship, whether it was overloading, or improper stowage of the cargo, because the master was responsible in the final windup to have his ship seaworthy on going to sea. And the court in that particular case held that the cause of the improper stowage was due partly to the master of the ship, and partly to the stevedore, as the Court of Appeals did in the case at bar, but the Court in *The Seguranca* still held the ship solely responsible for the loss.

On page 22 the Court of Appeals said:

"The appellant claimed as an offset damage alleged to have been suffered by him because of improper loading of the Seguranca by the stevedores employed by the appellee as charterer, consisting in the expense of removal of part of the cargo and loss of revenue, claimed to have been due to shortage of cargo due to improper loading. The evidence is conflicting as to whether the admitted tenderness of the ship after it was loaded was due to improper stowage of the cargo or to the alleged crankiness of the ship herself. We find it unnecessary to determine as between these causes. Section 15 of the charter party provided that:

" 'The charterers or their agents shall provide and pay a stevedore to do the stowing of the cargo under the supervision of the master.'

"One Tracy was employed by the charterer to do the loading. His testimony is to the effect that the loading was done in a manner known to and approved by the master, and that additional cargo of resin, a subject of complaint by the appellant, was put on the ship only after the intention to do so was made known by Tracy to the master, and that the master made no objection, until after it was loaded on the ship, and that the first objection or protest made by the master was after the ship was loaded and when a list became apparent. It is true that the evidence of the master, Dixon, is partly in conflict with Tracy's. The District Judge, after hearing the evidence of both, came to the conclusion that any improper stowing of cargo was due to the joint fault of the stevedore, Tracy, and the master, Dixon, and under the terms of the charter party, it was made the master's duty to supervise the stowing of the cargo. Under these circumstances, we agree with the conclusion reached in the District Court that the appellant should take nothing by reason of this offset."

In the case of The Dana, 190 Fed. 650, the cargo was furnished by the charterer, and the amount put abroad was also determined by the libellant's agent, still the Court held

the ship responsible because the captain did not refuse or reject to carry the amount offered, nor did he object to the way in which the load was placed on his vessel. The Court held that the master held his vessel out as being able, loaded as she was, to satisfactorily carry the cargo to its destination.

On page 653, the Court said:

> "It appears that the load was furnished by the libellant and that the quantity offered was also determined by the libellant's agent, while the captain of the vessel only supervised, in a general way, the placing of the cargo, and indicated the quantity which he would undertake to carry. There, again, the master's actions were of a negligent character. He did not refuse or object to carry the amount offered, nor did he object to the way in which the load was placed upon his vessel. So it must be assumed that he undertook the voyage with the cargo in the condition in which it was put upon his vessel, and therefore that the vessel was held out to be seaworthy, to the extent of being able to undertake what her master undertook to do with her."

Poore on Charter Parties, Section 3 reads as follows:

> "The seaworthiness of the ship is under the absolute control of the master. Neither he nor his owners are excused because the charterers load the ship in such a way as to make her unseaworthy."

(a) *The loss was the direct result of this unseaworthiness.*

The District Court found as a fact that the cause of the loss was the unseaworthiness of the vessel. On page 203 the District Court said:

> "I think the loss was occasioned solely by reason of the ship being overloaded, with a deck cargo improperly stowed, under the supervision of the master."

Although the District Court saw and heard all but two of the witnesses, the Circuit Court of Appeals failed to give proper consideration to the findings of fact made by the District Court, and the Circuit Court of Appeals found that

the loss was caused partly by the unseaworthiness of the vessel, and partly by the insufficient strength of the cribbing, and the improper stowage of the Cargo. Now we say that if our interpretation of the cases on pages 8-12 above is correct, it is wholly immaterial whether the District Court or the Circuit Court of Appeals is correct on its findings as to the cause of the loss, for it was the positive duty of the master of the ship, as the agent of the owners, to make his ship not only seaworthy in hull and machinery, but seaworthy in respect to stowage and staying of the cargo.

On this very point the Circuit Court of Appeals in the Olsen case (supra) on page 21 said:

> "It would, in our opinion, be unwise and dangerous to impair the implied warranty of seaworthiness of the ship herself. The district Judge rightly held that the steamer was unseaworthy on leaving Ship Island. The jettison was caused not by sea peril, but by her own instability. It makes no difference whether this was due to the amount or the stowage of the deckload alone or also to the fact that the largest ballast tank could not be filled. All these matters were under the absolute control of the master and it was his duty to see that they were right. It was no excuse to him that the charterers did the loading; insisted upon his taking the deckload or that the surveyors certified that the ship could do so safely. No doubt both thought so. That, however, did not lessen his duty, especially in view of the fact that he did not think so himself."

The findings of the Supreme Court in the case of *Lawrence v. Minturn*, supra pages 8, 9 and the findings of the Circuit Court of Appeals for the Second Circuit in the *Olsen* case supra are conclusive in this case

III.

THE SHIP WAS RESPONSIBLE FOR THE LOSS (REGARDLESS OF THE LAW REQUIRING THE CAPTAIN TO MAKE HIS SHIP SEAWORTHY) BECAUSE THE CAPTAIN REFUSED TO PUT ON THE ATHWARTSHIP LASHING SUGGESTED BY THE CHARTERERS BECAUSE THE CAPTAIN ACTUALLY OVERLOADED HIS SHIP AND IMPROPERLY STOWED THE CARGO.

The District Court found as a fact that the stevedore suggested the placing of an athwartship lashing running from the foremast to the stanchions, on each side, as shown in Exhibit 5 on page 187 of the record. The District Court further found that the Captain declined to put such a lashing on.

On this phase of the matter, the District Court on page 198 said:

> "It appears in evidence that the superintendent in charge of the plant at Murray recommended to the master that he put an athwartship lashing at the foremast, the same to go around the foremast and be made fast on the stanchions opposite the foremast. This lashing the captain refused to use on his first trip. It appears that the suggestion was renewed by the libelant's superintendent on the second trip and the captain again refused to put it on; and it was on this trip that the loss occurred. It appears that on the third trip the lashing was put on."

Regarding the placing of this same lashing the Circuit Court of Appeals found on page 214, as follows:

> "He (the captain) was consulted about the lashings and expressed the opinion that one reading from side to side at the foremast was unnecessary."

The finding of fact by the District Court should be conclusive.

The testimony shows that where this lashing would have been was where the cargo first started to go (see Opinion of District Court, page 199), and we say that regardless of the question of the master's duty to make his ship seaworthy, the Captain's refusal to put this lashing on and thereby properly stay the cargo, may well have been the immediate cause of the loss, for which the ship was clearly responsible, regardless of all other facts in the case.

IV.

AS A QUESTION OF LAW THE SHIP WAS SOLELY LIABLE ON THE FACTS AS FOUND BY THE CIRCUIT COURT OF APPEALS.

No proof is necessary to show that if the cargo had been properly loaded and stayed and the ship had been seaworthy, the cargo would not have gone overboard in the calm waters of the inner harbor as it did in this case. If our interpretation of the cases quoted above is correct to the effect that it was the duty of the Captain to see that his cargo was properly stowed and stayed and his vessel seaworthy, it must follow as a conclusion of law that the ship was solely responsible for this loss.

We therefore contend that on the facts as found by the Circuit Court of Appeals, regardless of the facts found by the District Court, the rulings of law by the Circuit Court were erroneous and in direct conflict with the Circuit Court of Appeals for the second Circuit in the Olsen case, supra pages 9, 10, 13 and the rulings of the Supreme Court in the case of Lawrence v. Minturn, supra pages 8, 9.

In view of the importance of the question involved; the difference in the views of the law taken by the two courts; the departure of the Court of Appeals from the established rules laid down by this court, and the rule laid down by the Circuit Court of Appeals for the Second Circuit, the writ should issue as prayed for.

JOHN W. LOWRANCE,

NATHAN W. THOMPSON,

Proctor for the Oxford Paper Company,

Petitioner.